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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JUANITA GARCIA, Defendant and Appellant.	B233491 (Los Angeles County Super. Ct. No. NA057199)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jose I. Sandoval, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Linda C. Johnson and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Juanita Garcia challenges the trial court's denial of her motion for new trial. Appellant contends it should have been granted on the grounds she received ineffective assistance of counsel as a result of an irreconcilable conflict of interest. We affirm.

FACTUAL[1] AND PROCEDURAL HISTORY

Appellant had a turbulent relationship with David Zweig characterized by mutual violence and abuse. They lived together in a house owned by Zweig in Long Beach. Zweig had installed a computerized camera system in the house which recorded appellant shooting Zweig in the stomach on October 13, 2002. Zweig died on November 17, 2002, as the result of complications from the gunshot wound. Appellant was the primary beneficiary to Zweig's trust, which contained assets of approximately $2.1 million after taxes. Appellant contacted Zweig's trust attorney several times after the shooting to ask about using trust assets to pay his medical bills and his funeral expenses.

Attorney Benjamin Wasserman was retained by appellant to represent her interests in the trust and in the criminal case that was later filed against her in connection with Zweig's death. Wasserman made demands on the trust on her behalf after Zweig's death. He also made several calls to police investigators to check on the status of the criminal case in relation to appellant's entitlement to the proceeds of the trust.

A jury convicted appellant of premeditated murder with use of a firearm and she was sentenced to life without possibility of parole pursuant to a financial gain special circumstance. Appellant appealed the judgment on various grounds. We remanded the matter to the trial court to allow appellant the opportunity to file a motion for new trial, but affirmed the judgment in all other respects.

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[1] An extensive recital of the facts in the case is presented in our previous opinion (*People v. Garcia* (May 13, 2009, B197063) [nonpub. opn.]). We offer a summary here and discuss any specific facts relevant to our analysis below.

A remittitur was issued on October 7, 2009, and an attorney from the Public Defender's office was appointed to represent her. Appellant filed a notice of motion for new trial due to ineffective assistance of counsel on January 19, 2011. Appellant argued that Wasserman's representation of her in the criminal action and in the trust proceedings created a conflict of interest that denied her due process and a fair trial. Appellant asserted that two separate conflicts of interest arose which resulted in prejudice to her. First, appellant argued that it was Wasserman's contact with the trust attorney which brought the trust to the police's attention and ultimately resulted in a criminal charge for murder with the special circumstance allegation that it was committed for financial gain. Second, appellant contended that Wasserman became a material part of the evidence against her when the trust attorney testified that Wasserman contacted him about distribution of the trust proceeds on appellant's behalf shortly after Zweig's death. As a result, Wasserman's credibility was compromised in the jury's eyes.

In opposition, the People argued that appellant waived the conflict during a preliminary hearing and in any event, Wasserman did not have a conflict of interest. The trial court denied the motion for new trial on June 2, 2011, finding the waiver was ineffective but that there was not a reasonable probability the result would have been different. The trial court explained, "If an appropriate waiver had been taken, the people would still have introduced evidence that defendant contacted the trust administrator in their effort to show greed as a motive to commit the murder. If there had been no waiver, her new attorney would still have had to deal with the defendant's having contacted the trust [attorney]. It does not appear that the defendant has sufficiently shown that even if there were a conflict, that it adversely affected her representation. The record indicates that the defense called 18 witnesses in their defense throughout a [trial] length of 33 days and that the Court of Appeal ultimately upheld the conviction. The court also notes there appears to have been strong evidence against the defendant including video tape evidence of the shooting. Given the lengthy trial and numerous witnesses it does not appear that the counsel's representation fell below a standard as to raise a concern about ineffective assistance of counsel."

Appellant filed her notice of appeal the same day.

DISCUSSION

Appellant contends on appeal that the trial court abused its discretion when it denied her motion for new trial as there was substantial evidence in the record which established ineffective assistance of counsel as a result of a conflict of interest. Appellant argues that she received ineffective assistance of counsel because Wasserman contacted the trust attorney, which brought the trust to the attention of the authorities and resulted in the financial gain special circumstance allegation being levied against her. Further, Wasserman reported the existence of the trust to authorities because he wanted to be paid from its proceeds. We disagree.

In *Strickland v. Washington* (1984) 466 U.S. 668, 687, the Supreme Court held that claims of conflicts of interest are a category of ineffective assistance of counsel that generally require a defendant to show (1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different. (*Mickens v. Taylor* (2002) 535 U.S. 162 (*Mickens*); *People v. Doolin* (2009) 45 Cal.4th 390, 417.) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.)

We review the trial court's ruling for abuse of discretion.[2] (*People v. Navarette* (2003) 30 Cal.4th 458, 526; see 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, §§ 123–124, pp. 153–155, and cases cited.) Thus, appellant has the

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[2] The People note that the Courts of Appeal have applied differing standards of review in cases involving motions for new trial based on ineffective assistance of counsel claims. (Compare *People v. Taylor* (1984) 162 Cal.App.3d 720, 724-725 [substantial evidence of trial court's findings with independent review of legal questions] with *People v. Callahan* (2004) 124 Cal.App.4th 198, 211 [abuse of discretion].) The California Supreme Court itself has noted that courts have applied differing standards of review in new trial motions based on other grounds depending on whether the motion was granted or denied. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1263.) Appellant also appears to conflate the standards of review, urging us to find an abuse of discretion due to substantial evidence of a conflict. For our purposes, this is a distinction without a difference and we need not reach the issue as our conclusion would remain under either standard.

burden to demonstrate that the trial court's decision was "irrational or arbitrary," or that it was not """grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue. . . .""" (*People v. Callahan, supra,* 124 Cal.App.4th at pp. 211-212.) This burden is a heavy one. The appellate court gives the order all of the presumptions in favor of any appealable judgment and need only find "some showing" to support the trial court's order. (*Ibid.*) With these guidelines in mind, we conclude there was no abuse of discretion. There was more than "some showing" supporting the trial court's finding that appellant would not have obtained a more favorable result in the absence of Wasserman's purported conflict.

It was undisputed that appellant shot Zweig. She confessed to the crime, but claimed she acted in self-defense. The video recordings from Zweig's surveillance system, however, show that appellant retrieved a gun from her bedroom and hid it behind a pillow when she shot him. There was no indication Zweig was threatening her at the time. The night before the shooting, officers responded to a 911 call by one of appellant's sons that claimed Zweig was threatening people with guns. Appellant told officers that Zweig was acting aggressively and might be drunk but did not ask them to remove Zweig or the guns from the house. Zweig told the officers that appellant and her sons were setting him up because he was trying to evict them. The officers concluded that Zweig did not appear drunk and that no crime had occurred.

There was also ample evidence appellant had a financial motive to kill Zweig. Appellant knew that Zweig had created a trust. In fact, she told the trust attorney that he had misspelled Zweig's name in the trust documents. She admitted she knew he was leaving most of his assets to her. Audio recordings from the surveillance system also show that in early October, appellant demanded Zweig pay her $15,000 to move out and when he only offered her $5,000 to leave immediately, she threatened to "take [him] down." Appellant also contacted the trust attorney both before and after Zweig died regarding paying his medical and funeral expenses. Even if the jury did not hear evidence of Wasserman's contact with the trust attorney, there was ample evidence to support a finding of financial motive.

Moreover, the trial court's finding that even if there were a conflict, it did not adversely affect Wasserman's representation of appellant was supported by the record. At trial, the defense presented considerable evidence, including testimony from appellant, appellant's family, the neighbors, Zweig's ex-wife, appellant's and Zweig's friends, and even Zweig's dog trainer, to show Zweig's violent nature and abusive relationship with appellant. The witnesses also testified that appellant was not concerned about money. Appellant had been gainfully employed; she declined a $100,000 share of her father's estate; and she declined expensive jewelry from Zweig. Given the evidence against her and the considerable defense mounted by counsel, it is unlikely the outcome of the proceedings would have been different. There was no abuse of discretion in the trial court's ruling.

Nevertheless, appellant contends she need not show prejudice because a presumption of prejudice is warranted in this case. Appellant relies on *Mickens, supra,* 535 U.S. 162 for the proposition that Wasserman's representation of her implicated his financial interests and created an actual conflict of interest which compelled a presumption of prejudice. *Mickens* does not support appellant's argument.

The question presented in *Mickens* was whether a presumption of prejudice applied where the trial court failed to inquire into a potential conflict of interest about which it knew or reasonably should have known. (*Mickens, supra,* at p. 164.) The holding reached in *Mickens* is inapplicable. The dicta in *Mickens,* however, does present analysis relevant to our inquiry. However, it does not advance appellant's argument.

In dicta, the *Mickens* court noted that "[w]e have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." (*Mickens, supra,* at p. 166.) The court then examined Supreme Court cases in which the presumption had been properly applied. In those cases, counsel had represented multiple defendants or was hired and paid by a party with divergent interests. In its consideration of circuit cases, the court cautioned against an

"expansive application" of the presumption, citing to, among others, cases where representation of a defendant somehow implicated counsel's personal or financial interests. (*United States v. Hearst* (9th Cir. 1980) 638 F.2d 1190, 1193 [book deal], *Garcia v. Bunnell* (9th Cir. 1994) 33 F.3d 1193, 1194-1195, 1198, fn. 4 [a job with the prosecutor's office], *U.S. v. Michaud* (1st Cir. 1991) 925 F.2d 37, 40-42 [teaching classes to Internal Revenue Service agents].) Thus, *Mickens* does not stand for the proposition that a presumption of prejudice is always warranted where there is a financial conflict of interest. Instead, it appears to caution against it.

Accordingly, we conclude a presumption of prejudice is not applicable to the conflict asserted here. It is not the case that appellant was denied the assistance of counsel entirely or during a critical stage of the proceeding. Indeed, the finding that Wasserman's performance was not deficient is supported by the record. As discussed above, there is ample evidence supporting appellant's conviction and thus, the likelihood that the verdict is unreliable is low.

Appellant's reliance on *United States Ex Rel. Simon v. Murphy* (E.D. Pa. 1972) 349 F.Supp. 818 (*Murphy*), and *People v. Rundle* (2008) 43 Cal.4th 76 (*Rundle*) is similarly misplaced. In *Rundle*, the court held that no presumption of prejudice applied and the record did not demonstrate prejudice. (*Rundle, supra,* at pp. 173-174.) In *Murphy*, the defendant established the probability of a different outcome. There, defense counsel would only be paid upon acquittal. As a result, he was late in communicating an offer to the defendant and counseled against it. The trial court found she would have accepted the plea agreement. (*Murphy, supra,* at p. 823.) Those are simply not the facts of the instant case, and thus we find *Murphy* distinguishable.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J. GRIMES, J.